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In the Supreme Court of the United States

OCTOBER TERM, 1975

PETER C. ANDRESEN, PETITIONER

v.

STATE OF MARYLAND

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INDEX

	Page
Question presented	1
Interest of the United States	2
Constitutional provisions involved	3
Statement	4
Summary of Argument	18
Argument:	
The privilege against being compelled to be a witness against oneself does not bar the admission into evidence of an individual's business records seized pursuant to a search warrant	23
A. Introduction	23
B. The search and seizure of petitioner's business records did not subject him to the testimonial compulsion prohibited by the Fifth Amendment	26
C. The self-incrimination clause was not intended to bar the seizure of documentary evidence pursuant to a valid search warrant	36
D. The values reflected by the privilege against self-incrimination are not impaired by the search and seizure of petitioner's business records	46
Conclusion	52

200-966—76——1

CITATIONS

Cases:

	Page
Abel v. *United States*, 362 U.S. 217	20, 34
Barnes v. *United States*, 412 U.S. 837	24
Bellis v. *United States*, 417 U.S. 85	26, 46, 49, 51
Benton v. *Maryland*, 395 U.S. 784	24
Berger v. *New York*, 388 U.S. 41	20, 32, 52
Boyd v. *United States*, 116 U.S. 616	19, 27, 29, 39
Cady v. *Dombrowski*, 413 U.S. 433	44
Couch v. *United States*, 409 U.S. 322	18, 27, 28, 44, 45, 46, 49
Cupp v. *Murphy*, 412 U.S. 291	44
Entick v. *Carrington*, 19 How. St. Trials 1029	21, 37, 38, 39
Gouled v. *United States*, 255 U.S. 298	19, 30, 33
Grosso v. *United States*, 309 U.S. 62	27
Hale v. *Henkel*, 201 U.S. 43	26
Harris v. *United States*, 331 U.S. 145	34
Hill v. *Philpott*, 445 F.2d 144, certiorari denied, 44 U.S. 991	21, 34, 42, 43, 44
Hoffa v. *United States*, 385 U.S. 293	20, 32
Horowitz, In re, 482 F. 2d 72, certiorari denied, 44 U.S. 867	28, 49
Johnson v. *United States*, 228 U.S. 457	45
Kastigar v. *United States*, 406 U.S. 441	22, 51
Katz v. *United States*, 389 U.S. 347	20, 33, 52
Koran v. *United States*, 469 F. 2d 1071	32
Maness v. *Meyers*, 419 U.S. 449	32
Marron v. *United States*, 275 U.S. 192	20, 34
Michigan v. *Tucker*, 417 U.S. 433	36
Miranda v. *Arizona*, 384 U.S. 436	26, 31
Murphy v. *Waterfront Commission*, 378 U.S. 52	46
Oklahoma Press Publishing Co. v. *Walling*, 327 U.S. 186	28

Cases—Continued

	Page
People v. *Thayer*, 63 Cal. 2d 635, 408 P. 2d 108, certiorari denied, 384 U.S. 908	34, 35
People v. *Tucci*, 179 Colo. 373, 500 P. 2d 815	45
Romanelli v. *Commissioner*, 466 F. 2d 872	33
Schmerber v. *California*, 384 U.S. 757	19, 29, 30, 47
Shaffer v. *Wilson*, 523 F. 2d 175, petition for a writ of certiorari pending, No. 75–601	2, 45
Stanford v. *Texas*, 379 U.S. 476	21, 40
Stanley v. *Georgia*, 394 U.S. 557	41
Taylor v. *State of Minnesota*, 466 F. 2d 119, certiorari denied, 410 U.S. 956	45
Truitt v. *Lenahan*, C.A. 6, No. 75–1694, decided February 5, 1976	45
United States v. *Beck*, 511 F. 2d 997	45
United States v. *Bennett*, 409 F. 2d 88, certiorari denied *sub nom. Haywood* v. *United States*, 396 U.S. 852	45, 51
United States v. *Blank*, 459 F. 2d 383, certiorari denied, 409 U.S. 887	45
United States v. *Curreri*, 368 F. Supp. 757	45
132	46
United States v. *Dionisio*, 410 U.S. 1	19, 30
United States v. *Gargotto*, F. 2d 1009	45
United States v. *Iannelli*, 339 F. Supp. 171	45
United States v. *Lefkowitz*, 285 U.S. 452	20, 34
United States v. *Mara*, 410 U.S. 19	19, 30
United States v. *Muckenstrum*, 515 F. 2d 568	33
United States v. *Murray*, 492 F. 2d 178	45

Cases—Continued Page
United States v. *Nobles*, 422 U.S. 225---- 27
United States v. *Scharfman*, 448 F. 2d 1352, certiorari denied, 405 U.S. 919---- 45
United States v. *Wade*, 388 U.S. 218------ 19, 30
United States v. *Walk-In Vault, A*, 395 F. Supp. 833---------- 46
Vonder Ahe v. *Howland*, 508 F. 2d 364---- 45
Warden v. *Hayden*, 387 U.S. 294------ 20, 30, 39
Wilson v. *United States*, 221 U.S. 361----- 26
Constitution, statute and rules:
Constitution of the United States:
First Amendment---------- 23, 40
Fourth Amendment---------- *passim*
Fifth Amendment---------- *passim*
18 U.S.C. 3103a---------- 2, 3, 25
Federal Rules of Criminal Procedure:
Rule 41(b)(1)---------- 2, 3
Rule 41(b)(3)---------- 34
Miscellaneous:
Amedican Law Institute, *A Model Code of Pre-Arraignment Procedure*, Section SS 210.3 (Proposed Official Draft, April 15, 1975)---------- 25, 51
Chafee, *The Progress of the Law 1919–1922*, 35 Harv. L. Rev. 673 (1922)------ 31
Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cin. L. Rev. 671 (1968)---------- 27, 49
Kamisar, *The Wiretapping-Eavesdropping Problem: A Professor's View*, 44 Minn. L. Rev. 891 (1960)---------- 41
Levy, *Origins of the Fifth Amendment* (1968) ---------- 37, 40, 41
VIII Wigmore, *Evidence* § 2264 (McNaughton rev. 1961)---------- 28, 31, 43

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QUESTION PRESENTED

The United States will address the following question:

Whether a person's privilege under the Fifth Amendment against being compelled to be a witness against himself can be invoked to bar the admission into evidence of his business records seized by law enforcement officers in compliance with the Fourth Amendment.

INTEREST OF THE UNITED STATES

This case presents an important question relating to the proper scope of the Fifth Amendment privilege against self-incrimination. There are a large number of federal prosecutions (*e.g.*, tax, securities, gambling and narcotics cases) in which the defendant's financial records or other papers constitute trustworthy evidence of criminal activity. Accordingly, the United States has a direct interest in the question whether the court below correctly held that the Fifth Amendment privilege cannot be invoked to bar the introduction into evidence of an individual's business records seized by law enforcement officers pursuant to an otherwise valid search warrant. The identical question is involved in *Shaffer* v. *Wilson,* 523 F. 2d 175 (C.A. 10), petition for a writ of certiorari pending, No. 75-601, in the context of the seizure by special agents of the Internal Revenue Service of the business records of an individual taxpayer pursuant to a search warrant issued upon a showing of probable cause to believe that the records would contain evidence that the taxpayer willfully evaded paying taxes.

Moreover, petitioner's claims of privilege implicitly call into question the validity of an Act of Congress (18 U.S.C. 3103a) that authorizes the issuance of a warrant "to search for and seize any property that constitutes evidence of a criminal offense in violation of the laws of the United States," and of a similar provision promulgated by this Court in Rule 41(b)(1) of the Federal Rules of Criminal Procedure. The

enactment of 18 U.S.C. 3103a and the amendment of Rule 41(b)(1) followed this Court's decision in *Warden* v. *Hayden,* 387 U.S. 294, which expanded the scope of lawful searches and seizures beyond the categories of instrumentalities, fruits of a crime, or contraband. It is important that federal law enforcement officers know under what circumstances the exercise of their authority under these statutorily-defined standards will violate the constitutional rights of persons under investigation. Thus, the resolution of the question presented will have a significant impact upon a broad range of cases to which the United States is a party.[1]

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their pesons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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[1] We do not address petitioner's other claims (Br. 26–37) with respect to the validity of the search warrant because they are necessarily tied to the particular facts of the case and do not appear to present legal questions of broad significance to the United States. Thus, our position is that if the search and seizure complied with the requirements of the Fourth Amendment, the evidence seized was properly admitted at petitioner's trial.

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

STATEMENT

1. Petitioner is an attorney specializing in real estate settlements in Montgomery County, Maryland. In early 1972, there was considerable public disclosure of various "kick-back" schemes, imposition of unnecessary charges on home buyers, and unethical relationships between lawyers, real estate brokers, title companies and developers in real estate settlements in the Washington, D.C. area. As a result, a Bi-County Fraud Unit, under the joint auspices of the State's Attorneys' Offices of Montgomery and Prince George's Counties, commenced an investigation into such practices (Pet. App. A. 1–2).

During the investigation, petitioner's activities as a real estate settlement attorney came under scrutiny. Two special investigators interviewed the purchaser, mortgage holder, and other lienholders with respect to a transaction involving Lot 13T in the Potomac Woods subdivision of Montgomery County. They also searched the land records of Montgomery County. The investigation revealed that petitioner, acting as a settlement attorney, had defrauded Standard-Young Associates, a home construction firm, by representing to it upon its purchase of Lot 13T that the property was free of liens and that no title insurance was necessary, when in fact he knew that there were two outstanding liens on the property. The investigation

further revealed that the lienholders subsequently threatened to foreclose their liens, forcing a halt to construction on the property. After Standard-Young confronted petitioner with these developments, petitioner, acting as agent of the Title Insurance Company of Minnesota, issued a title insurance policy to Standard-Young. The policy guaranteed that Standard-Young received a clear title to the property, and petitioner's issuance of such a policy thereby defrauded the insurance company by requiring it to pay the outstanding liens (Pet. App. A. 23–28, 37–38; A. 97–113, 116–118).

Because the facts relating to petitioner's activities with respect to Lot 13T indicated that there was probable cause to believe that he had committed the crime of false pretenses against Standard-Young, the special investigators set forth the facts they had discovered in sworn affidavits as the basis for applications for two search warrants (A. 97–113, 116–118). The applications sought permission to search petitioner's law offices and the offices of Mount Vernon Development Corporation [2] for specifically described documents "that directly pertain[ed] to the sale and conveyance of [Lot] 13T * * *" (A. 108). A judge of the Sixth Judicial Circuit of Montgomery County concluded that there was probable cause and issued the warrants (A. 94–96, 114–115).

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[2] Petitioner was the sole shareholder, incorporator, resident agent, and director of Mount Vernon Development Corporation (A. 101). That entity was involved in some of the transactions at issue (see Pet. App. A. 25).

200-966—76——2

On October 31, 1972, the searches of the two offices were simultaneously carried out between the hours of 10:30 a.m. and 3:00 p.m. During the search of his law offices, petitioner was present and free to move about. In addition, petitioner's counsel was present during the latter half of the search (Supp. Tr. 168–170, 175).[3] The documents seized from petitioner's law offices represented approximately two to three percent of the files in that office (Supp. Tr. 176). The search of the office of Mount Vernon Development Corporation was carried out by a single special investigator in the presence of a police officer. They were admitted to that office by the manager of the building. This search took approximately four hours, and less than five percent of the corporate files were seized (Supp. Tr. 64–65, 75–76).

Prior to the execution of the search warrants, the Bi-County Fraud Unit had received complaints concerning petitioner's activities with respect to other lots in the Potomac Woods subdivision (Supp. Tr. 185–188). The gist of the complaints was that petitioner, as settlement attorney, took money from three sets of home purchasers upon assurances that he would deliver to them titles free and clear of all encumbrances, but that instead he misappropriated the purchase money to other purposes (Pet. App. A. 7). Specifically, petitioner had entered into an arrangement with the building contractor (Clark-King Construction Company) pursuant to which he would advance

[3] "Supp. Tr." refers to the transcript of the hearing on petitioner's motion to suppress.

$2,000 upon the sale of each lot to release the aliquot portion of the outstanding liens on each lot. It was expected that Clark-King would reimburse petitioner for his advances when its sales improved. However, petitioner never advanced any funds for release of the liens but instead transmitted the purchasers' payments to Clark-King. Thus, the purchasers did not receive clear titles to the properties as petitioner had promised them (Pet. App. A. 7–8).

The three complainants, each of whom had purchased homes using petitioner as the settlement attorney, were Richard Pollitt, Seth Warfield, and Robert Holtzclaw (Pet. App. A. 9–15). Pollitt purchased Lot 12S in the Potomac Woods subdivision. However, when he later attempted to sell his house, his attorney informed him that there was an outstanding lien on the property (Tr. 88–89, 102).[4] An attorney hired by Warfield also advised him that his property (Lot 25R) was encumbered with a lien (Tr. 112). Upon learning of petitioner's fraudulent misrepresentations from others in the community, Holtzclaw inquired of the State's Attorney's office, which informed him that his property (Lot 7T) was similarly encumbered (Tr. 152, 154–155).

2. Petitioner was subsequently charged by information and indictment with false pretenses, relating to his misrepresentation to Standard-Young Associates concerning Lot 13T, and with fraudulent misappropriation by a fiduciary, relating to the false claims to the three home buyers Pollitt, Warfield, and Holtz-

[4] "Tr." refers to the transcript of the trial proceedings.

claw (Pet. App. A. 1, 88).[5] Petitioner thereupon filed a motion to suppress the seized documents, and the trial court held a full suppression hearing (Pet App. A. 29). The items seized from the two offices were listed on the returns of the search warrants (A. 119–129). At the suppression hearing, a large number of the documents that had been seized pursuant to the warrant were returned by the State to petitioner. Of

[5] Originally, petitioner was charged by information with four counts of false pretenses relating to Lot 13T. He was also charged in an indictment containing 17 counts, the first 12 of which related to the purchases by Pollitt, Warfield and Holtzclaw. In connection with each purchase, petitioner was charged with larceny after trust of $100 or more, embezzlement, fraudulent misappropriation by a fiduciary, and false pretenses (Tr. 1035–1036). The last five counts in the indictment were false pretenses, forgery, uttering, failure to pay tax and recording charges, and misrepresentation of a taxable consideration (Supp. Tr. 393).

The charges in the information and indictment were consolidated for trial (Pet. App. A. 1). At the end of the trial, the State presented to the jury only the first two counts of false pretenses in the information and the first twelve counts in the indictment (Tr. 933–934). The jury found petitioner guilty on eight of the 16 counts which it considered: five counts of false pretenses and three counts of fraudulent misappropriation by a fiduciary (Tr. 1069; Pet. App. A. 2). The trial court sentenced petitioner to eight concurrent two-year terms (Pet. App. A. 2). The Court of Special Appeals of Maryland reversed petitioner's convictions on four of the five counts of false pretenses because a necessary element of the offense, the intent to defraud, had not been alleged (Pet. App. A. 19–22). Because those counts are no longer at issue, we have described the charges against petitioner relating to the Pollitt, Warfield, and Holtzclaw transactions only as misappropriation by a fiduciary.

the 52 items listed on the return as having been seized from the offices of Mount Vernon, the State returned approximately 45 items (Supp. Tr. 15, 98). The trial court suppressed six other items on the ground that there was no nexus between those items and petitioner's alleged criminal conduct. The only item seized from the corporation's offices that was not returned by the State or suppressed by the trial court was Item 51 on the return, a file captioned "Potomac Woods General" (A. 127, 143–144.)[6]

At trial, three documents from the corporate file captioned "Potomac Woods General" were admitted into evidence as State's Exhibits 1B–1D.[7] The documents were handwritten notes prepared by Carl Zentz, an employee of petitioner, in the course of his duties as a title searcher and law clerk (Pet. App. A. 46–47; Tr. 302, 309, 311). The three exhibits were notes with respect to deeds of trust affecting various lots in the Potomac Woods subdivision, from which Zentz had prepared abstracts (Tr. 311). These documents related to the transaction involving Lot 13T (Pet. App. A. 46–47), with respect to which the first count of the in-

[6] This item, a file folder, was identified at the suppression hearing by numbering the individual documents contained in the file as Defendant's Exhibits 10–14 (Supp. Tr. 102).

[7] Although the Court of Special Appeals stated that five documents from the corporate files were admitted into evidence (Pet. App. A. 46), it appears that only three such documents were admitted and that the two labeled as State's Exhibits 1A and 1E were not actually admitted (Tr. 315).

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formation charged petitioner with false pretenses against Standard-Young Associates.[8]

Of the 29 items listed on the return as having been seized from petitioner's law office,[9] seven were returned by the State (Supp. Tr. 13) and four were suppressed by the trial court for lack of nexus with petitioner's alleged criminal conduct (Supp. Tr. 366). Approximately five of the remaining items were admitted into evidence (Pet. App. A. 47). The first of the items seized from petitioner's law offices, which was introduced at trial as State's Exhibit 2, was a folder captioned "Clark-King to Holtzclaw," relating to the conveyance of Lot 7T to Holtzclaw (Tr. 156–160). The second item was a file captioned "Antonelli to Mount Vernon to Young Contracting Company," which was identified as State's Exhibit 3 (Pet. App. A. 47; Tr. 64). This file contained five documents: settlement statements for the buyer and seller, a deed conveying the property to Young dated July 17, 1972, and an original and copy of a notice to the buyer regarding releases of liens (Tr. 484–485, 487, 493, 494, 507). Each of the documents directly related to the transaction involving Lot 13T (Pet. App. A. 47). The

[8] The documents established that petitioner's representation to Standard-Young Associates that Lot 13T was free of liens was false and that he knew it was false.

[9] A total of 28 rather than 29 items were actually seized from petitioner's law offices. Item Number 29 listed on the return (A. 121) identified the same file as Item Number 18 (A. 120; Supp. Tr. 13).

third item was a handwritten note from a file captioned "Clark-King to Antonelli," identified as State's Exhibit 4 (Tr. 64, 601–602). That file dealt exclusively with Lot 13T (Pet. App. A. 47). The fourth item was a copy of a deed of trust dated March 27, 1972, from Clark-King Construction Company to F. O. Day Company,[10] which was introduced as proof of petitioner's alleged failure to pay recording taxes (identified as State's Exhibit 10A) (Tr. 64, 606).[11] A certified copy of this document from the land records in Montgomery County was included in State's Exhibit 36 (Tr. 362, 616). The final item seized from petitioner's law offices included samples of his handwriting, which were introduced as State's Exhibit 20 (Tr. 66, 471–473).[12]

[10] The first deed of trust to F. O. Day Company encumbered the three lots which were the subject of the other charges against petitioner (Pet. App. A. 8).

[11] The charge of failure to pay recording taxes was abandoned by the State. See n. 14, *infra*.

[12] A handwriting expert testified that the samples were written by petitioner (Tr. 468–472). Although petitioner was willing to stipulate that the expert would testify that the documents were written by petitioner, he would only so stipulate on the condition that he could argue to the jury that someone else might have written them. As a result the trial court permitted the handwriting expert to testify (Tr. 465–466).

Two of the handwritten notes were introduced at trial for the purpose of proving that petitioner knowingly made misrepresentations with respect to Lot 13T, as charged in Count 1 of the information (Pet. App. A. 24–27). In one of the notes in petitioner's handwriting, attached to the file marked "Clark-King to Anton-

3. The bulk of the evidence admitted at trial, State's Exhibits 21 through 67, was not seized from petitioner's corporate or law offices,[13] but was produced from the records of the complaining purchasers, lienholders, the title insurance company, and the public land records of Montgomery County. For example, with respect to the transaction involving Lot 7T, purchased by Holtzclaw, State's Exhibit 29 consisted of the contract of purchase, Holtzclaw's settlement statement and title insurance policy, and other documents given by him to the prosecution (Tr. 131–132). From the business records of Enterprise Federal Savings and Loan Association, the mortgagee, a title insurance binder, loan application and other papers were introduced as State's Exhibit 32 (Tr.

elli" and identified as part of State's Exhibit 20D at trial, he directed his employee to set up a "deferred card" so as to delay the release of the liens on Lot 13T (Pet. App. A. 24). The other document in petitioner's handwriting was a draft of the purchase contract for Lot 13T, which recited that the property was "free of encumbrance[s]" except as otherwise specified in the contract (Pet. App. A. 25).

[13] The origin and status of State's Exhibits 1–20 was as follows: State's Exhibits 1 (Records of Mount Vernon Development Corporation) and 2 (records from petitioner's law offices) were seized and admitted into evidence. State's Exhibits 3–16, containing items which were seized from petitioner's law offices, were marked (Tr. 64) for introduction into evidence. However, only State's Exhibits 3, 4, and 10A were admitted into evidence. State's Exhibits 17 and 18 were corporate records which petitioner produced pursuant to a subpoena. State's Exhibit 19 was an analysis of the items contained in the handwriting file prepared by the handwriting expert. State's Exhibit 20 contained several documents seized from petitioner's law offices upon which petitioner's handwriting appeared, together with papers containing known handwriting samples of petitioner and an analysis of the handwriting expert.

225–227). These items established that Holtzclaw had purchased Lot 7T with the understanding from petitioner that it would be free of encumbrances. From Montgomery County land records came copies of the deed, releases of liens and other documents that were introduced as State's Exhibit 34 (Tr. 270–287). Copies of documents concerning Lot 7T, obtained from the business records of Title Insurance Company of Minnesota, were admited as State's Exhibit 57 (Tr. 709–710). All of this evidence was admitted without objection. (Tr. 131–132, 226–227, 287, 710). In addition, the business records of three lienholders, F. O. Day Company (State's Exhibit 37), State National Bank of Bethesda (State's Exhibit 62), and Madison National Bank (State's Exhibit 50), were admitted into evidence (Tr. 346–347, 794, 632). These items established that petitioner did not arrange for the release of the three outstanding liens upon Lot 7T, and thus failed to deliver to Holtzclaw a free and clear title pursuant to his promise, as charged in Count 11 of the indictment (see Pet. App. A. 13–15).

Likewise, with respect to the fraudulent misappropriation charge concerning Lot 12S, purchased by Pollitt, none of the evidence was obtained as a result of the search and seizure of documents from petitioner's law offices. Documents from Pollitt's own records, including his settlement sheet and a waiver of the right to receive notice of the release of liens, were introduced and established that Pollitt purchased Lot 12S with the understanding from peti-

200-966—76——3

tioner that aside from the purchase money mortgage he executed, the lot was free of encumbrances (see, for example, State's Exhibits 21, 22, 24, 25) (Tr. 77–84). In addition the mortgagee's records and certified copies of documents from the Montgomery County land records were introduced into evidence (State's Exhibits 23, 34; Tr. 171, 271–272, 287), as were the records of the lienholder (State's Exhibit 37; Tr. 346–348). This evidence established that petitioner did not fulfill his express obligation to Clark-King to extinguish the liens and deliver the clear title he promised to Pollitt, as charged in Count 3 of the indictment (Pet. App. A. 9–11).

Finally, the same type of evidence was obtained with respect to Lot 25R, which was purchased by Warfield. Warfield's records (State's Exhibit 27; Tr. 107–109) and the records of the mortgagee (State's Exhibit 28; Tr. 164) established that Warfield had taken the property with the understanding from petitioner that the lot was unencumbered by prior deeds of trust. The records of the lienholder (State's Exhibit 37) established that petitioner did not extinguish the encumbrance and thereby failed to deliver the clear title he promised to Warfield, as charged in Count 7 of the indictment (Pet. App. A. 11–13). In other words, this count was proved entirely by evidence from sources other than the records seized from petitioner's law offices.

4. To summarize the status of the documents, the State returned to petitioner approximately 45 items seized from the Mount Vernon Development Corporation and seven items seized from petitioner's law offices (Supp. Tr. 13, 15, 98; A. 139). The trial court granted petitioner's motion to suppress with respect to six items seized from the corporation and four items seized from petitioner's law offices on the ground that they were unconnected with the charges against him. The trial court denied petitioner's motion to suppress with respect to the one remaining item seized from the corporation and 17 items seized from petitioner's law offices (A. 139, 143–144). However, the State at trial only introduced into evidence one exhibit containing corporate records and five exhibits containing documents seized from petitioner's law offices (Pet. App. A. 46–47).

In denying the suppression motion, the trial court held (A. 136–144) that the introduction into evidence of the items seized did not violate either the Fourth or Fifth Amendment. With respect to petitioner's Fourth Amendment claim, the trial court concluded that the warrants were supported by probable cause, that the evidence seized was not stale, that most of the seized documents related directly to Lot 13T and were within the scope of the search warrants, and that the items which did not directly relate to Lot 13T were admissible as evidence that would establish a pattern of criminal conduct with respect to Lot 13T.[14] With respect to petitioner's Fifth Amendment claim, the

[14] The trial court's discussion of State's Exhibit 10A (A. 142–143) is no longer germane because it related to the charge of failure to pay recording taxes, which was abandoned by the State before the case went to the jury.

trial court held that the search and seizure did not force petitioner to be a witness against himself because he was not compelled to produce or authenticate the seized documents (A. 142).

At trial, the State presented the testimony of all of the parties defrauded by petitioner. Thus, George Young of Standard-Young testified concerning his purchase of Lot 13T as follows: that he paid a fee to petitioner at settlement; that at the time of settlement petitioner assured him that title insurance was not necessary because the title was good; that after the bank threatened to foreclose on one of the unknown liens, he confronted petitioner, who did not deny that the property was encumbered; that petitioner thereafter issued a title insurance policy guaranteeing a clear title; and that construction on Lot 13T was interrupted for several months (Tr. 473–531). Richard Pollit testified (Tr. 76–106) that he paid petitioner a fee at settlement, that he understood that he would be receiving clear title, and that he subsequently learned that Lot 12S was encumbered. Seth Warfield (Tr. 106–130) and Robert Holtzclaw (Tr. 130–162) testified to the same effect with respect to their purchases of Lots 25R and 7T, respectively.

Moreover, the State presented the testimony of the lienholders. For example, Peter Hitchen of the F.O. Day Company testified that he confronted petitioner after petitioner's failure to discharge the liens was discovered. Hitchen related that he told petitioner, "[i]t looks to me as though you've been playing the

old escrow game," but that petitioner said nothing (Tr. 351). Finally, Carl Zentz, petitioner's law clerk, testified (Tr. 309, 311–313) that he wrote notes for the purpose of preparing abstracts for petitioner, which notes set forth the fact that there were undischarged liens on the properties that petitioner later guaranteed were free of encumbrances. Petitioner's secretary, June Stup, testified that on one occasion she questioned petitioner as to the correctness of a draft deed prepared by him that stated that it was free of encumbrances except as otherwise specified, but that petitioner directed her to type the deed as he had prepared it (Tr. 592–595).

The jury found petitioner guilty on eight of the sixteen counts that it considered: five counts of false pretenses and three counts of fraudulent misappropriation by a fiduciary (Tr. 1069; Pet. App. A. 2). The trial court sentenced petitioner to eight concurrent two-year prison terms (Pet. App. A. 2).

5. The Court of Special Appeals of Maryland affirmed the trial court's judgment with respect to petitioner's Fourth and Fifth Amendment claims (Pet. App. A. 28–54).[15] It held (A. 33–35) that the search

[15] The Court of Special Appeals reversed petitioner's convictions on four of the five counts of false pretenses, relating to the Pollitt, Warfield, and Holtzclaw transactions, because a necessary element of the offense, the intent to defraud, had not been alleged in the indictment (Pet. App. A. 19–22). Hence, as the case comes to this Court, petitioner seeks reversal of his convictions on one count of false pretenses relating to Lot 13T and three counts of misappropriation of funds by a fiduciary relating to the Pollitt, Warfield, and Holtzclaw transactions, for which he received four concurrent two-year prison terms.

warrants did not authorize a general search in violation of the Fourth Amendment and that the phrase in the warrants—"together with other fruits, instrumentalities and evidence of crime at this time unknown"—must be read in light of the remaining parts of the search warrant to authorize only the seizure of those items which might show the crime of false pretenses with respect to petitioner's sale of Lot 13T. The court further held that the warrants were supported by probable cause to believe that a crime had been committed and that the seized items that were ultimately introduced at trial were within the scope of the warrants (Pet. App. A. 36–49). In addition, the court agreed with the trial court that the search did not abridge petitioner's Fifth Amendment privilege against being compelled to be a witness against himself because he was not compelled to do anything (Pet. App. A. 49–54).

SUMMARY OF ARGUMENT

1. The Fifth Amendment prohibition against compelling a person to be a witness against himself is a personal privilege that "adheres basically to the person, not to information that may incriminate him." *Couch* v. *United States,* 409 U.S. 322, 328. In order to activate the privilege, certain critical elements must conjoin: there must (1) be compulsion on the individual (2) to require testimony or acts of a testimonial character (3) exposes the individual to potential criminal liability. The privilege is not transgressed simply by virtue of the fact that the accused is made

the source of incriminating evidence, so long as the evidence is not secured by means of testimonial compulsion. See *United States* v. *Mara,* 410 U.S. 19, 21–22 (compelled creation of handwriting exemplars); *United States* v. *Dionisio,* 410 U.S. 1, 5–7 (voice exemplars); *United States* v. *Wade,* 388 U.S. 218 (compelled utterance of words in identification line-up); *Schmerber* v. *California,* 384 U.S. 757 (unconsented blood sample).

It is true that, under the holding in *Boyd* v. *United States,* 116 U.S. 616, the privilege is available to excuse compliance with a subpoena for the production of personal books and papers in the possession of the individual claiming the privilege. But it is clear from later decisions of this Court such as *Couch* that the privilege is available in such circumstances because the act of production constitutes an authentication of the fact that the papers produced are those called for by the subpoena. Unlike a subpoena, a search and seizure does not require the individual to aid in the discovery, production, or authentication of incriminating evidence; it thus does not fall within the rationale for application of the privilege that underlies contemporary applications of the *Boyd* holding.

The fact that the objects involved in an otherwise lawful search and seizure are private papers rather than other kinds of evidence does not alter the analysis. As this Court long ago stated in *Gouled* v. *United States,* 255 U.S. 298, 309: "There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seiz-

ure * * *." Seizures of incriminating papers were consistently upheld in such cases as *Marron* v. *United States,* 275 U.S. 192; *United States* v. *Lefkowitz,* 285 U.S. 452, 465–466; *Abel* v. *United States,* 362 U.S. 217, 238, subject only to the then-prevailing requirement that the papers constitute instrumentalities of crime rather than "mere evidence." The overruling of the immunity of "mere evidence" from seizure in *Warden* v. *Hayden,* 387 U.S. 294, coupled with *Gouled's* observation that papers enjoy no special status, effectively disposes of the issue in this case.

We recognize that the Court stated in *Hayden* that it was not there deciding the question, but we think it is clear from cases decided contemporaneously with *Hayden* that the seizure of evidence of a "communicative" character, while closely scrutinized for compliance with the procedural requirements of the Fourth Amendment, does not implicate Fifth Amendment concerns. Thus, the Court in *Hoffa* v. *United States,* 385 U.S. 293, rejected the defendant's contention that the testimony of a government informant about his conversations with the defendant violated the defendant's Fifth Amendment privilege, since he had not been compelled to speak to the informant. So, here, petitioner was in no way compelled to create the papers that were seized. This conclusion is further bolstered by cases such as *Berger* v. *New York,* 388 U.S. 41, and *Katz* v. *United States,* 389 U.S. 347, in which the Court recognized that private conversations have no absolute immunity from seizure. If that is true, it follows *a fortiori* that the kind of documents seized from petitioner can enjoy no such immunity.

2. The seizure of business records pursuant to a valid search warrant is an action far removed from the evils that promoted the development of the "right to silence" in England and the adoption of a constitutional provision in the United States protecting individuals from being forced to bear witness against themselves in criminal proceedings. The dictum in *Boyd* equating a search and seizure with a subpoena for Fifth Amendment purposes appears to be based upon a dictum in *Entick* v. *Carrington,* 19 How. St. Trials 1029, that has otherwise had no continuing vitality in either English or American law. The enduring significance of *Entick* has been in its condemnation of general warrants, a view embodied in the warrant clause of the Fourth Amendment. As *Stanford* v. *Texas,* 379 U.S. 476, confirms, the protection of private papers from unjustified official scrutiny is the mission of the Fourth Amendment, perhaps reinforced in special cases by First Amendment policies of free expression, but it is far removed from the policies that inform the Fifth Amendment testimonial privilege.

The weight of appellate authority among courts that have considered this question is contrary to petitioner's position. The major case espousing his view is *Hill* v. *Philpott,* 445 F. 2d 144 (C.A. 7), which concluded that personal books and records should be immune from seizure because they "speak against [a defendant] as clearly as his own voice" (*id.* at 149).

200-966—76——4

But other kinds of tangible evidence, although not documentary in nature, can, and often do, "speak" against a defendant in the same fashion, *i.e.*, by evidencing his criminal activities. Thus, the logical but surely unacceptable result of the Seventh Circuit's decision in *Hill* is to exclude from evidentiary use on Fifth Amendment grounds all evidence of guilt seized from a defendant.

3. Finally, the invalidity of petitioner's claim may readily be perceived when it is evaluated against the policies that may reasonably be suggested to underlie the Fifth Amendment privilege. Of the policies catalogued in *Murphy* v. *Waterfront Commission,* 378 U.S. 52, 55, none has even arguable application here except for the suggested objective to preserve a "private enclave" for the individual, free from any kind of governmental scrutiny. But this Court has never sustained a Fifth Amendment claim predicated solely or even primarily on privacy interests, and any such ruling would be, we think, wholly inconsistent with the principles of *Gouled, Schmerber, Katz,* and similar cases. Indeed, if privacy were a sufficient basis for application of the privilege, the long-standing practice of compelling testimony from immunized witnesses, which was recognized by this Court in *Kastigar* v. *United States,* 406 U.S. 441, could hardly be sustained.

ARGUMENT

THE PRIVILEGE AGAINST BEING COMPELLED TO BE A WITNESS AGAINST ONESELF DOES NOT BAR THE ADMISSION INTO EVIDENCE OF AN INDIVIDUAL'S BUSINESS RECORDS SEIZED PURSUANT TO A SEARCH WARRANT

A. INTRODUCTION

This brief is addressed generally to the broad question whether an individual's papers are immune, by virtue of the self-incrimination provision of the Fifth Amendment, from a search and seizure conducted in compliance with the procedural requirements of the Fourth Amendment. We contend that the Fifth Amendment privilege confers no such immunity and that the lawfulness of such searches and seizures are in all instances to be assessed on the basis of the Fourth Amendment (possibly influenced in a narrow category of special cases by First Amendment considerations).

This is not a case in which the papers seized are of an intimately personal nature, such as a diary or a personal letter to a family member or friend. Although we believe that the self-incrimination provision confers no immunity from search and seizure even in such instances, the papers that were seized in this case are of a character far removed from that kind of inti-

mately personal document. They were simply commonplace business records and other documents reflecting various fraudulent real estate transactions perpetrated by petitioner (Pet. App. A. 46–47).[16] As the court below observed, almost all of the papers seized from petitioner were impersonal items such as "deeds of easements, declaration of covenants, abstract reports, deeds of trust and title binders" (Pet. App. A. 46).[17] What emerges, therefore, from an examination of the documents seized and admitted into evidence, is that they were not "personal diaries, letters, or other writings or recordings, made solely for private use or communication to an individual occupying a family,

[16] For the convenience of the Court, we are filing a separate Appendix of Exhibits reproducing copies of all the documents seized pursuant to the search warrants that were admitted into evidence at trial. These documents fall into two categories: (1) State's Exhibits 1B–1D, which were seized from the office of Mount Vernon Development Corporation; and (2) State's Exhibits 2, 3, 4, 10A and 20, which were seized from petitioner's law offices.

[17] Indeed, an analysis of the business records seized suggests that the Court could apply the discretionary concurrent sentence doctrine of *Benton* v. *Maryland*, 395 U.S. 784, 791, and decline to consider petitioner's Fifth Amendment claim. See *Barnes* v. *United States*, 412 U.S. 837, 848 and n. 16.

As the case comes to this Court, petitioner seeks review of his convictions on one count of false pretenses, relating to his misrepresentation concerning Lot 13T to Standard-Young Associates, and on three counts of misappropriation by a fiduciary, relating to his failure to deliver clear titles to Richard Pollitt, Seth Warfield, and Robert Holtzclaw, in connection with the purchase of their homes. The trial court sentenced petitioner to concurrent two-year terms on each of these four counts.

Because the documents seized from Mount Vernon Development Corporation are not eligible for the privilege against self-incrimination (see n. 19, *infra*), petitioner's Fifth Amendment claim is arguably applicable only with respect to the five items

personal or other confidential relation[ship]" (American Law Institute, *A Model Code of Pre-Arraignment Procedure,* Section SS 210.3 (Proposed Official Draft, April 15, 1975)).[18] Thus this case does not implicate the special concerns that might arise in cases of seizures of more intimately personal papers.[19]

seized from his law offices. But those items (State's Exhibits 2, 3, 4, 10A, and 20) related only to the Standard-Young transactions and the Holtzclaw purchase. (In fact, State Exhibit 10A related to the charge of failure to pay recording taxes which was dropped by the State prior to the submission of the case to the jury (see nn. 11, 14, *supra*)).

However, as the Statement points out (*supra*, pp. 12–14), the evidence necessary to convict petitioner on the two counts of misappropriation by a fiduciary with respect to the Pollitt and Warfield transactions (for which he was sentenced to concurrent two-year terms) was not obtained from the search and seizure of petitioner's records but came from independent sources. It may therefore be appropriate for the Court to exercise its discretion under the concurrent sentence doctrine and decline to consider petitioner's constitutional claims.

[18] The Note to this portion of Section SS 210.3 of the American Law Institute's Proposed Official Draft *Code of Pre-Arraignment Procedure* states that it "carves out a limited area of immunity from seizure for private documents, such as diaries, that have played no part in any criminal enterprise." The scope of the exception, which embodies a statutory policy rather than a constitutional right, is therefore coextensive with 18 U.S.C. 3103a, which authorizes the seizure of "property that constitutes evidence of a criminal offense in violation of the laws of the United States."

[19] Moreover, contrary to petitioner's assertion (Br. 19) that the seizure "amounted to literally thousands of papers," the fact is that his Fifth Amendment claim is at best limited to the very small number of the seized documents that were actually admitted into evidence at trial. Petitioner makes no claim that the authorities

B. THE SEARCH AND SEIZURE OF PETITIONER'S BUSINESS RECORDS DID NOT SUBJECT HIM TO THE TESTIMONIAL COMPULSION PROHIBITED BY THE FIFTH AMENDMENT

1. The Fifth Amendment privilege provides that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself * * *." This constitutional prohibition "demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." *Miranda* v. *Arizona,* 384 U.S. 436, 460. Since the privilege is a personal privilege

developed any leads from the papers seized that were not introduced into evidence.

Of the 29 items seized from petitioner's law offices, seven were returned by the State and four were suppressed by the trial court as irrelevant to the charges. However, the State chose to introduce only five exhibits into evidence. These exhibits (State's Exhibits 2, 3, 4, 10A, and 20) consisted of various impersonal legal documents such as title insurance binders, deeds of trust, and contracts of sale, which petitioner used in connection with his criminal activities.

Finally, only one of the 52 items seized from the office of Mount Vernon Development Corporation, consisting of notes made by petitioner's employee for the purpose of preparing title abstracts, was admitted in evidence as State's Exhibits 1B–1D. However, it is well established that the privilege against self-incrimination could not be invoked with respect to such corporate records. See, *e.g.*, *Hale* v. *Henkel*, 201 U.S. 43; *Wilson* v. *United States*, 221 U.S. 361; *Bellis* v. *United States*, 417 U.S. 85, 88–89. Of the remaining 51 items seized from Mount Vernon, the State returned 45 items prior to the suppression hearing and the trial court suppressed six items as irrelevant to the charges against petitioner.

which "adheres basically to the person, not to information that may incriminate him" (*Couch* v. *United States,* 409 U.S. 322, 328), the element of personal compulsion upon the accused is critical to a claim under the Fifth Amendment. Thus, while the Constitution proscribes forcing a person to participate actively in the establishment of his guilt by condemning himself through his own testimony, it does not foreclose the use of statements elicited from another. In those circumstances, there is no personal compulsion imposed upon the accused. *United States* v. *Nobles,* 422 U.S. 225, 233–234.

Although the Fifth Amendment privilege was arguably intended to do no more than confer a testimonial privilege upon a witness in a judicial proceeding, this Court in *Boyd* v. *United States,* 116 U.S. 616, held that a person could not be compelled to obey a subpoena requiring the production of private documents in his possession that might tend to incriminate him.[20]

While the privilege has thus been extended to encompass documentary evidence as well as testimony, the Court has subsequently made clear that the ground of its decision in *Boyd* was that compliance

[20] This result has been criticized in Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cin. L. Rev. 671, 701–703 (1968). The author argues that the production of documents, as contrasted with oral testimony, ought not to be protected by the privilege against self-incrimination. See also *Grosso* v. *United States*, 390 U.S. 62, 76–77 (Stewart, J., concurring).

with a subpoena to produce private papers involves testimonial compulsion.[21] When a person is called upon to produce his private papers, "still there is a testimonial disclosure implicit in their production. It is the witness' assurance, compelled as an incident of the process, that the articles produced are the ones demanded." VIII Wigmore, *Evidence* § 2264, p. 380 (McNaughton rev. 1961). Thus, a person's very act of compliance with a subpoena for his private papers would acknowledge that the items produced were in fact his private papers and would thereby constitute an implicit authentication of them. As the Court reaffirmed in *Couch* v. *United States, supra,* 409 U.S. at 330–331, "[i]n *Boyd,* the production order was directed against the owner of the property who, by responding, would have been forced 'to produce and authenticate any personal documents or effects that might incriminate him.' *United States* v. *White,* 322 U.S., at 698." Where, as here, the evidence is obtained by search and seizure rather than by subpoena, the element of compulsory authentication, essential to a claim of the privilege in the context of documents, is absent.

We submit that the self-incrimination provision of the Fifth Amendment, whatever may be its impact in the case of a subpoena, does not bar the seizure of an individual's private papers, no matter what their

[21] The dictum in *Boyd* that a subpoena is equivalent to an unreasonable search and seizure under the Fourth Amendment, which evoked the disagreement of two Justices in *Boyd* itself, was implicitly rejected in *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186, 195–196. For a comprehensive discussion of the contemporary applicability of the Fourth Amendment to subpoenas, see *In re Horowitz,* 482 F.2d 72, 75–79 (C.A. 2) (Friendly, J.), certiorari denied, 414 U.S. 867.

character, assuming a valid search and seizure under the Fourth Amendment. We recognize that there is dictum in *Boyd* (116 U.S. at 633) that broadly suggests that "the seizure of a man's private books and papers to be used in evidence against him is [not] substantially different from compelling him to be a witness against himself." But just as two Justices refused in *Boyd* to subscribe to the dictum equating a search and seizure with the subpoena actually involved in that case (116 U.S. at 638–641), the Court's subsequent emphasis upon the ingredient of testimonial compulsion as a prerequisite to a self-incrimination claim wholly undermines the assumption embodied in the *Boyd* dictum.[22]

When the element of testimonial compulsion is lacking, the recent decisions of this Court demonstrate that the privilege is unavailable to bar the introduction of evidence even though the source of the evidence is the accused himself. Thus, for example, in *Schmerber* v. *California,* 384 U.S. 757, the Court held that the unconsented taking of a blood sample from a person under arrest, for the purpose of conducting a chemical analysis of its alcoholic content, was not

[22] As we indicate below (*infra*, pp. 37–40), the dictum in *Boyd* was not premised on the "testimonial" or "communicative" nature of the evidence but on the now-rejected theory that the mere seizure of evidence (of any kind) compelled a defendant to bear witness against himself. As we there point out, the history of the self-incrimination clause demonstrates that, at the time of the adoption of the Constitution, the English common law right of silence was not viewed in the United States as according any special protection against the search and seizure of an individual's private papers as opposed to other objects of evidential value.

barred by the privilege. Although such evidence may serve to incriminate the accused, the Court stated that "[t]he distinction which has emerged * * * is that the privilege is a bar against compelling 'communications' or 'testimony', but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it" (384 U.S. at 764). Since admission of the blood test evidence did not involve "even a shadow of testimonial compulsion upon or enforced communication by the accused" (*id.* at 765), it was not barred by the privilege against self-incrimination. Similarly, in *Warden* v. *Hayden,* 387 U.S. 294, 302–303, the Court rejected the "mere evidence" rule of *Gouled* v. *United States,* 255 U.S. 298, which had prohibited police searches for "mere evidence" (as opposed to instrumentalities of a crime or contraband) and held that the seizure of items of clothing from an accused person did not compel him to become a witness against himself. See also *United States* v. *Wade,* 388 U.S. 218 (compelled utterance of words in an identification lineup); *United States* v. *Dionisio,* 410 U.S. 1, 5–7 (voice exemplars); *United States* v. *Mara,* 410 U.S. 19, 21–22 (handwriting exemplars).

In our view, the foregoing principles require rejection of petitioner's claim that the search and seizure of his business records violated his privilege against self-incrimination. Unlike the subpoena in *Boyd,* which required that the accused produce and thereby authenticate his private papers for use against himself in a criminal proceeding, the search and seizure in this case involved no disclosure, production, or

authentication by petitioner. Rather, production was effected by law enforcement officers and the authentication of petitioner's records was made by a handwriting expert (Tr. 468–473). See generally VIII Wigmore, *Evidence* § 2264 (McNaughton rev. 1961). As Professor Chafee pointed out, the privilege is not violated by a search and seizure because the person is not compelled to do something active. Chafee, *The Progress of the Law, 1919–1922,* 35 Harv. L. Rev. 673, 697–698 (1922). This observation is pertinent here, where the search and seizure was pursuant to a warrant issued by a court and was carried out in a reasonable manner and without petitioner's participation.

In short, in this case the State produced the evidence against petitioner "by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." *Miranda* v. *Arizona, supra,* 384 U.S. at 460. With respect to a search and seizure of business records, even more than with respect to the unconsented taking of a blood sample, the accused's "participation * * * [is] irrelevant." *Schmerber* v. *California, supra,* 384 U.S. at 765.

Thus, petitioner gains nothing by arguing (Br. 13) that the production of the papers could not have been compelled by subpoena. The availability of the privilege in resisting a subpoena is simply irrelevant to the question whether the seizure of these documents pursuant to a warrant compelled petitioner to be a witness against himself, since in this case he was

forced neither to produce nor to authenticate the documents. Indeed, petitioner's argument proves too much—if the lawful seizure of any item were precluded by virtue of the fact that a self-incrimination claim could be interposed in resistance to a subpoena, then the self-incrimination provision would threaten to render most searches illegal, since, under the logic of the authentication rationale, the government aguably could no more compel such an individual by subpoena to produce knives, bloodstained clothes, or other items of tangible personal property in his possession (cf. *Maness* v. *Meyers,* 419 U.S. 449, 461) than it could compel the production of books and records.

2. It was unnecessary, as the Court said, for it to decide in *Hayden* "whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure" (387 U.S. at 303).

However, earlier in the Term in which *Hayden* was decided, the Court in *Hoffa* v. *United States,* 385 U.S. 293, had rejected the contention that the testimony of an informant about his conversations with the defendant violated the defendant's privilege, noting that the defendant had not been compelled to make the statements. Cf. *Koran* v. *United States,* 469 F. 2d 1071, 1072 (C.A. 5). And in *Berger* v. *New York,* 388 U.S. 41, which involved the collection of evidence by means of eavesdropping on private conversations, the Court summarily dismissed in a footnote the defendant's "mere evidence" argument that his privilege against self-incrimination was invaded. See 388 U.S. at 44 n. 2; see also *id.* at 97

n. 4 (Harlan, J., dissenting). Finally, in *Katz* v. *United States,* 389 U.S. 347, 354, the Court made clear that private conversations may validly be seized pursuant to a warrant complying with the requirements of the Fourth Amendment.

If the seizure of an individual's private conversations, which necessarily involves a substantial invasion of personal privacy, does not violate the Fifth Amendment, there can hardly be an absolute prohibition against the seizure of private papers. There is no basis for holding that although an oral conversation may be seized, a written transcript or tape recording of that conversation may not. In each instance, the testimonial compulsion necessary to a claim under the privilege against self-incrimination is lacking.

Apart from the *Boyd* dictum, this Court has never held that the seizure of an individual's private papers would violate his privilege against compulsory self-incrimination. Indeed, quite the contrary proposition was adopted by the Court in the line of cases beginning with *Gouled* v. *United States,* 255 U.S. 298, which applied the now discarded "mere evidence" rule but held that instrumentalities of crime could be seized pursuant to a proper warrant. As the Court stated in *Gouled* (255 U.S. at 309): "There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized." See also *Romanelli* v. *Commissioner,* 466 F. 2d 872, 877 n. 9 (C.A. 7); *United States* v. *Muckenstrum,* 515 F.2d 568 (C.A. 5).

After *Gouled,* this Court repeatedly affirmed that private papers of an individual may be seized and introduced into evidence if the papers were used in a criminal operation. See *Marron* v. *United States,* 275 U.S. 192 (records of an illegal business subject to seizure); *United States* v. *Lefkowitz,* 285 U.S. 452, 465–466 (same); *Abel* v. *United States,* 362 U.S. 217, 238 (false identity papers subject to seizure as instrumentalities of crime of espionage); cf. *Harris* v. *United States,* 331 U.S. 145, 150–155 (stolen papers subject to seizure). See also Rule 41(b)(3), Fed. R. Crim. P.; *People* v. *Thayer,* 63 Cal. 2d 635, 408 P. 2d 108, certiorari denied, 384 U.S. 908 (papers of physician engaged in false billing subject to seizure).

To the extent that the *Boyd* dictum suggested that the paper there in question could not validly have been seized any more than it could be subpoenaed, that was probably an accurate statement of the law as it was prior to *Hayden.* But as the foregoing decisions under the "mere evidence" rule make clear, the *Boyd* dictum was accurate not because the case involved a private paper but because the particular paper was "mere evidence" and not an instrumentality or fruit of crime. In the instant case, arguably, the papers siezed from petitioner's offices were in fact instrumentalities of his crimes of false pretenses and misappropriation, and thus subject to seizure under the *Marron-Lefkowitz-Abel* line of cases. See *Hill* v. *Philpott,* 445 F. 2d 144, 150 (C.A. 7) (Fairchild, J., dissenting), certiorari denied, 404 U.S. 991. However, we

need no longer concern ourselves with the subtle definitional problems posed by the distinction between "instrumentalities" and "mere evidence," because that distinction was abolished in *Warden* v. *Hayden, supra.*

The decisions of this Court involving seizures of papers that were deemed instrumentalities of crime cast their analyses in terms of the Fourth Amendment. We submit, however, that with respect to private papers the preservation of the mere-evidence/instrumentalities distinction is, if anything, even less sound when viewed from the perspective of the self-incrimination provision than when analyzed in Fourth Amendment terms. The focus of the Fifth Amendment privilege is, after all, incrimination, and the seizure of private papers employed as instrumentalities of crime is surely more incriminating than the seizure of comparable papers for mere evidentiary use. (The seizure of both types of papers, of course, involves exactly the same degree of compulsion.)

Thus, the abolition of the "mere evidence" rule has a further important consequence for this case. For if petitioner's Fifth Amendment claim is upheld, seizures of the type involved in *Marron* and similar cases would become invalid, so that records of gambling and narcotics transactions, if seized from the accused, could no longer be introduced in evidence. To put it another way, since incriminating documentary material has long been subject to search and seizure under the prior "instrumentalities" rule of the Fourth Amendment, it would be anomalous to uphold

petitioner's Fifth Amendment claim after the abolition in *Hayden* of that more restrictive rule simply because the evidence seized took the form of papers. We therefore submit that the Fifth Amendment offers no protection against the seizure of the documents taken from petitioner's offices in this case. We turn now to a discussion of the history of the privilege, which demonstrates that the Fifth Amendment was never intended to bar the seizure of documents pursuant to a properly particularized search warrant.

C. THE SELF-INCRIMINATION CLAUSE WAS NOT INTENDED TO BAR THE SEIZURE OF DOCUMENTARY EVIDENCE PURSUANT TO A VALID SEARCH WARRANT

1. As the Court recently observed in *Michigan* v. *Tucker*, 417 U.S. 433, 439–440, in construing the scope of the privilege against compulsory self-incrimination, "we must continue to hark back to the historical origins of the privilege, particularly the evils at which it was to strike." The Court there reviewed those historical origins, stating (*id.* at 440):

> The privilege against compulsory self-incrimination was developed by painful opposition to a course of ecclesiastical inquisitions and Star Chamber proceedings occurring several centuries ago. See L. Levy, Origins of the Fifth Amendment (1968); Morgan, The Privilege Against Self-Incrimination, 34 Minn. L. Rev. (1949); 8 Wigmore § 2250. Certainly anyone who reads accounts of those investigations, which placed a premium on compelling subjects of the investigation to admit guilt from their own lips, cannot help but be sensitive to the

> Framers' desire to protect citizens against such compulsion. As this Court has noted, the privilege against self-incrimination "was aimed at a . . . far-reaching evil—a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality."

Manifestly, the seizure of business records pursuant to a valid search warrant is far removed from the common law origins of the privilege. Although it was recognized in England that a person could not be compelled to produce incriminating documents pursuant to a subpoena, yet by the mid-eighteenth century "it was an open question whether the government, though unable to subpoena such evidence, might lawfully seize it by a search warrant and introduce it at the trial against the accused." Levy, *Origins of the Fifth Amendment* 390 (1968).

It is true that "the right of silence" had been extended in England by the 1760's "to prevent the use of general warrants to seize private papers in seditious libel cases" (*ibid.*), but it was never held to prohibit all searches for documentary materials. The leading case, frequently miscited for the broader proposition that the right of silence immunizes all documentary evidence from seizure, even pursuant to a lawfully authorized and particularized warrant, is *Entick* v. *Carrington*, 19 How. St. Trials 1029. There, the Secretary of State, seeking evidence of seditious libel, issued a warrant that commanded his messengers to seize John Entick "and to bring him with his papers to be examined before the secretary of state" (*id.* at

1063–1064). The court stated that the issuance of the warrant required that "the house must be searched; the lock and doors of every room, box, or trunk must be broken open; all the papers and books without exception, if the warrant be executed according to its tenor, must be seized and carried away; for it is observable, that nothing is left either to the discretion or to the humanity of the officer" (*id.* at 1064).

In writing for the court in *Entick* v. *Carrington,* Lord Camden stated that the issue was whether "the secret cabinets and bureaus of every subject in this Kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel" (*id.* at 1063). Although he was not persuaded that "such a power can be justified by common law," Lord Camden indicated that a warrant might issue under appropriate circumstances to search for a libel (*id.* at 1072):

> If libels may be seized, it ought to be laid down with precision, when, where, upon what charge, against whom, by what magistrate, and in what stage of the prosecution. All these particulars must be explained and proved to be law, before this general proposition can be established.

After concluding that the general warrant there involved failed to satisfy these standards, Lord Camden dismissed the additional argument that the search should be permitted because it had "utility * * * [as]

a means of detecting offenders by discovering evidence" (*id.* at 1073). In the course of rejecting such a contention, Lord Camden observed that "the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle" (*ibid.*).

It is this latter statement of Lord Camden that was quoted in *Boyd* v. *United States, supra,* 116 U.S. at 629, and was a principal basis of the *Boyd* dictum (116 U.S. at 633) that "the seizure of a man's private books and papers to be used in evidence against him" is equivalent to "compelling him to be a witness against himself." But Lord Camden never explained how subjection to a search and seizure of evidence forced a man to accuse himself. Indeed, in *Warden* v. *Hayden, supra,* the Court recognized that Lord Camden's dictum was not read by the English courts to bar all searches for papers (387 U.S. at 308–309 n. 12):

> Significantly, *Entick* v. *Carrington* itself has not been read by the English courts as making unlawful the seizure of all papers for use as evidence. See *Dillon* v. *O'Brien,* 20 L.R.Ir. 300; *Elias* v. *Pasmore,* [1934] 2 K.B. 164. Although *Dillon,* decided in 1887, involved instrumentalities, the court did not rely on this fact, but rather on "the interest which the State has in

> a person guilty (or reasonably believed to be guilty) of a crime being brought to justice * * *. 20 L.R.Ir., at 317.

Moreover, even after *Entick* v. *Carrington,* the right of silence was never construed in the American colonies as prohibiting the seizure of documentary evidence pursuant to a warrant. Rather, as Professor Levy has pointed out, objections to the seizure of documents were directed to the lack of specificity in the warrant (Levy, *Origins of the Fifth Amendment* 394 (1968)):

> Not even in the American cases following *Entick* v. *Carrington* did the colonial lawyers copy that precedent. Their argument was that while specific search warrants might be legal if issued on probable cause, a general warrant was illegal because it threatened personal liberty by vesting arbitrary power in the officer conducting the search.

Thus, the principal continuing impact of *Entick* is on Fourth Amendment jurisprudence. To the extent it has any other effect, it is in connection with those values of free expression fostered by the First Amendment, not those protected by the self-incrimination privilege. *Entick* involved an unrestrained search by government agents for seditious libel in the possession of John Entick, who was the author of a publication called Monitor or British Freeholder (see *Stanford* v. *Texas,* 379 U.S. 476, 483); perhaps the books and private papers seized from Entick would enjoy special protection deemed necessary to safeguard the right of

free expression (cf. *Stanley* v. *Georgia,* 394 U.S. 557), but these are unrelated to the policies of the self-incrimination privilege. See Levy, *supra, Origins of the Fifth Amendment* at 393; Kamisar, *The Wiretapping-Eavesdropping Problem: A Professor's View,* 44 Minn. L. Rev. 891, 911 (1960).[23]

This limited view of the scope of *Entick* appears to have been adopted by the Court in *Stanford* v. *Texas, supra.* There, the Court invalidated a warrant authorizing the search for and seizure of "books, records, pamphlets, cards * * * and other written instruments concerning the Communist Party of Texas" (*id. at* 478–479). The officers seized more than 2,000 documents, none of which pertained to the Communist Party of Texas. After citing *Entick* v. *Carrington* as authority against such police practice, the Court based its decision on the unconstitutional breadth of the warrant under the Fourth Amendment and not upon the notion that the Fifth Amendment prohibits the seizure of documentary evidence. In this connection, the Court noted that "the constitutional requirement that

[23] The books and records in issue in the instant case are hardly of the *Entick* character; they involved no expression of ideas, but instead documented the operation of petitioner's criminally fraudulent enterprise (see pp. 23–25, *supra*). Indeed, petitioner acknowledges (Br. 18) that he did not even personally prepare all of these records. Moreover, petitioner necessarily gave copies of many of the seized documents, relating to real estate transactions, to the persons with whom he dealt. Under these circumstances, even if the documents were not "instrumentalities" of petitioner's crimes, their comparatively impersonal nature renders them unlikely candidates for special protection from search and seizure.

warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain" (379 U.S. at 485). However, the Court made the following distinction between the seizure of materials pursuant to a general warrant as involved in *Entick* and the seizure of business books and records pursuant to a specific description in a search warant, as involved in the instant case (379 U.S. at 485 n. 16):

> The word "books" in the context of a phrase like "books and records" has, of course, a quite different meaning. A "book" which is no more than a ledger of an unlawful enterprise thus might stand on a quite different constitutional footing from the books involved in the present case. See *Marron* v. *United States,* 275 U.S. 192, 198–199. And in some situations books even of the kind seized here might, for purposes of the Fourth Amendment, be constitutionally indistinguishable from other goods—*e.g.,* if the books were stolen property.

2. Apart from dicta in *Boyd*, we have found little in the decisions of this Court supporting petitioner's contention. The only recent appellate decision upholding the view that the Fifth Amendment bars the seizure pursuant to a warrant of an individual's business records is *Hill* v. *Philpott,* 445 F. 2d 144 (C.A. 7), certiorari denied, 404 U.S. 991. In that case, the majority held that the seizure by special agents of the Internal Revenue Service of a physician's fiscal records, which evidenced his evasion of taxes, violated his privilege

against self-incrimination. In so concluding, the court relied heavily upon cases holding that "where the Internal Revenue Service has sought court enforcement of its summons pursuant to statute (26 U.S.C. § 7402), * * * a taxpayer may refuse production of personal books and records by assertion of his privilege against self-incrimination" (445 F. 2d at 146).

As we have pointed out at the outset of our argument, those decisions should not control the question in this case. When the government proceeds by summons or subpoena, the individual is arguably required to testify against himself in complying with the subpoena, since the act of compliance evidences an admission that the documents are his or, at the very least, that they are the materials sought by the subpoena. On the other hand, as Dean Wigmore has observed, when documents or other effects are obtained pursuant to a search "the proof of their authenticity, or other circumstances affecting them, may and must be made by the testimony of other persons, without any employment of the accused's oath or testimonial responsibility." VIII Wigmore, *Evidence* § 2264, p. 380 (McNaughton rev. 1961).

In rejecting Wigmore's distinction between compliance with a subpoena and passive subjection to a search and seizure, the Seventh Circuit stated: "Dean Wigmore's suggestion * * * ignores the realities of trial. The jury knows the books and records belong to the defendant and the entries he has made therein speak against him as clearly as his own voice" (445

F. 2d at 149). We respectfully submit that this reasoning is unsound. Indeed, if the Seventh Circuit's observation were correct, the taxpayer's books and records in *Couch* v. *United States,* 409 U.S. 322, would have been eligible for the privilege despite her lack of possession of them, because they also spoke against her "as clearly as [her] own voice (445 F. 2d at 149). Moreover, non-documentary tangible evidence, such as the bloodstained trousers and floor mat in the trunk of Dombrowski's automobile (*Cady* v. *Dombrowski,* 413 U.S. 433) or the material under Murphy's fingernails (*Cupp* v. *Murphy,* 412 U.S. 291), "spoke" against those defendants every bit as eloquently as the real estate documents involved in the instant case "speak" against petitioner. The rationale of *Hill* v. *Philpott,* if applied according to the dictates of logic, would in fact require exclusion of all tangible evidence seized from a criminal defendant.

To be sure, the disclosure of the evidence in petitioner's books and records may be unwelcome, but such discomfiture is not a ground upon which to claim the privilege against self-incrimination. Just as the ingredient of testimonial compulsion was lacking in *Couch* because the owner of the books and records was not compelled to produce them, the search and seizure in this case similarly did not force petitioner to prepare the documents or to produce or authenticate them. As Mr. Justice Holmes succinctly stated for the Court in *Johnson* v. *United States,* 228 U.S. 457, 458, "[a] party is privileged from producing the

evidence but not from its production." The Fifth Amendment, in short, was not aimed at the kind of compelled communication generated by the evidence itself.

The analysis and result in *Hill* v. *Philpott* have been consistently rejected by other appellate courts. See, *e.g., Truitt* v. *Lenahan,* C.A. 6, No. 75–1694, decided February 5, 1976; *United States* v. *Beck,* 511 F. 2d 997 (C.A. 6); *United States* v. *Blank,* 459 F. 2d 383 (C.A. 6), certiorari denied, 409 U.S. 887; *United States* v. *Gargotto,* 476 F. 2d 1009, 1013–1014 (C.A. 6); *Taylor* v. *State of Minnesota,* 466 F. 2d 1119 (C.A. 8), certiorari denied, 410 U.S. 956; *United States* v. *Bennett,* 409 F. 2d 888 (C.A.), certiorari denied *sub nom. Haywood* v. *United States,* 396 U.S. 852; *United States* v. *Scharfman,* 448 F. 2d 1352 (C.A. 2), certiorari denied, 405 U.S. 919; *Shaffer* v. *Wilson,* 523 F. 2d 175 (C.A. 10), petition for a writ of certiorari pending, No. 75–601; *United States* v. *Murray,* 492 F. 2d 178, 191 (C.A. 9); but cf. *Vonder Ahe* v. *Howland,* 508 F. 2d 364, 372–377 (C.A. 9) (Ely, J., concurring and dissenting). See also *People* v. *Tucci,* 179 Colo. 373, 500 P. 2d 815 (*en banc*); *People* v. *Thayer,* 63 Cal. 2d 635, 408 P. 2d 108 (*en banc*), certiorari denied, 384 U.S. 908; *United States* v. *Iannelli,* 339 F. Supp. 171 (W.D. Pa.); *United States* v. *Curreri,* 368 F Supp. 757 (D. Md.).[24] If books and records are

[24] Although this Court has recently cited *Hill* v. *Philpott* in two of its opinions, those cases involved Fifth Amendment questions unrelated to the issue here, and the citations, while illustrative, were not necessarily approving. See *Couch* v. *United States,* 409

to be treated differently from other objects of evidential value and even other "communicative" matter such as private conversations (which cases such as *Hoffa* and *Katz* indicate may constitutionally be seized), support for such a distinction—lacking in the history or language of the Fifth Amendment or the weight of appellate authority—must come, if at all, from a consideration of the policies underlying the privilege. It is to this subject that we now turn.

D. THE VALUES REFLECTED BY THE PRIVILEGE AGAINST SELF-INCRIMINATION ARE NOT IMPAIRED BY THE SEARCH AND SEIZURE OF PETITIONER'S BUSINESS RECORDS

The most comprehensive statement of the policies underlying the privilege against self-incrimination was made by this Court in *Murphy* v. *Waterfront Commission,* 378 U.S. 52, 55:

> [The privilege] reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play

U.S. 322, 330; *Bellis* v. *United States*, 417 U.S. 85, 88. However, even if the rule of *Hill* v. *Philpott* were applicable in this case, it would require a document-by-document analysis in order to determine which documents contained "entries" prepared by petitioner. See, *e.g.*, *United States* v. *DeMarsh*, 360 F. Supp. 132 (E.D. Wis.); *United States* v. *A Walk-In Vault*, 395 F. Supp. 833 (E.D. Wis.).

> which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load," 8 Wigmore, Evidence (McNaughton rev., 1961), 317; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life," *United States* v. *Grunewald*, 233 F. 2d 556, 581–582 (Frank, J., dissenting), rev'd 353 U.S. 391; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent." *Quinn* v. *United States*, 349 U.S. 155, 162.

While the Court has subsequently observed in *Schmerber* v. *California, supra,* 384 U.S. at 762, that "the privilege has never been given the full scope which the values it helps to protect suggest," a comparison of this case with the *Murphy* formulation is nevertheless instructive, since it shows that most of these values are not even remotely affected by the search for and seizure of documents pursuant to a warrant complying with the requirements of the Fourth Amendment.

The concern with the "cruel trilemma," which is at the core of the protection secured by the privilege, might perhaps have been activated had the law enforcement officers investigating petitioner's crimes sought to compel oral testimony from petitioner regarding the transactions or his authentication of the

seized records. But petitioner can hardly claim that he was subjected to "the cruel trilemma of self-accusation, perjury or contempt" when he was never required to perform any act, much less a testimonial act, and was not in any way exposed to sanction for either perjury or contempt.

Nor could the search in this case in any way have offended our preference for an accusatorial rather than an inquisitorial system of criminal justice. After the seizure of petitioner's records, the State was still obliged to authenticate them through its own witnesses and bear the burden of proving petitioner's guilt beyond a reasonable doubt. The bare fact that petitioner was in some remote way the source of evidence contributing to his conviction (in somewhat the same sense that a robber's presence at the bank he robs is the "source" of eyewitness identification testimony) does not affect the admissibility of the evidence in an accusatorial proceeding. Here petitioner was far less the "supplier" of incriminating evidence than were the defendants in cases such as *Schmerber, Wade, Dionisio,* and *Mara,* who were required to create evidence by affirmative acts compelled at a time when they had become criminal suspects.

Moreover, this case does not involve any "inhumane treatment and abuses," nor the distrust which attaches to "self-deprecatory statements," nor possible impairment of any protection to the innocent. Documentary evidence of the kind at issue here has correctly been described as "the most reliable evidence that can

exist." Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change,* 37 U. Cin. L. Rev. 671, 702 (1968). Similarly, the search and seizure of petitioner's books and records should not disturb our sense of "fair play." After a thorough investigation demonstrated that there was probable cause to believe that petitioner was engaged in a series of fraudulent real estate transactions that injured many innocent people, it can hardly be denied that "good cause [was] shown for disturbing him." Under these circumstances, the power of the state to disturb the privacy of the individual by subjecting him to arrest, and his premises to search, are beyond question.

Of all the values arguably reflected by the privilege against compelled self-incrimination, only the privacy interests identified in the "private enclave" term employed by Judge Frank in *Grunewald* has even the remotest connection to the seizure of personal papers. While privacy interests have been alluded to in recent Amendment decisions of this Court (*Bellis* v. *United States,* 417 U.S. 85, 91; *Couch* v. *United States, supra,* 409 U.S. at 327), we think Judge Friendly correctly suggested, in his thoughtful analysis of the matter in *In re Horowitz, supra,* 482 F. 2d at 85–86, that the protection of privacy interests is basically the province of the Fourth Amendment and is not the core of the self-incrimination privilege. As Judge Friendly noted, "no Supreme Court decision has upheld a Fifth Amendment

claim predicated solely, or even primarily, on the basis of an invasion of privacy * * *" (*id* at 85). Despite any allusions to privacy, the privilege has traditionally been and remains today applicable only when the two indispensible elements of testimonial compulsion and potential for incrimination conjoin.

Indeed, we submit that privacy values are no more implicated in this case than in any other search and seizure in an individual's home or office. No one could doubt that law enforcement officers, in possession of a proper warrant, could search every nook and cranny of petitioner's office or home for weapons, items of clothing, stolen property or other contraband, and the like. As this Court long ago recognized in *Gouled,* a Fourth Amendment case in which privacy interests were necessarily paramount in the Court's analysis (see p. 30, *supra*), there is no sufficiently distinct and more substantial privacy interest invaded when the search is for papers [24] to justify an absolute immunity from search and seizure.

Surely, the invasion of petitioner's privacy arising from the seizure of his business records is no greater than that entailed in the extraction of the blood sample sanctioned by the Court in *Schmerber* or the

[24] As we have discussed at the outset of our argument (pp. 23–25, *supra*), the papers at issue here are hardly of the intimate personal character warranting the protection of the privilege against self-incrimination. To the contrary, an examination of our Appendix of Exhibits confirms the correctness of the Maryland Court of Special Appeals' characterization of them as largely "deeds of easements, declarations of covenants, abstract reports, deeds of trust and title binders" (Pet. App. A. 46).

eavesdropping that *Katz* and *Berger* indicated could be undertaken if Fourth Amendment prerequisites are satisfied. Moreover, the long line of authority antedating the adoption of the Constitution that a witness may not refuse to testify once he is given immunity from prosecution (see *Kastigar* v. *United States,* 406 U.S. 441, 445–446, n. 13) establishes that the self-incrimination provision does not absolutely prohibit invasions of privacy by the state.[25]

It is therefore plain that the zone of privacy recognized by the Fifth Amendment is simply coextensive with the scope of the prohibition against testimonial compulsion. As the Court recently observed in *Bellis* v. *United States, supra,* 417 U.S. at 91 (emphasis supplied):

> We have recognized that the Fifth Amendment "respects a private inner sanctum of individual feeling and thought"—an inner sanctum which necessarily includes an individual's papers and effects *to the extent that the privilege bars their compulsory production and authentication—and "proscribes state intrusion to extract self-condemnation." Couch* v. *United States, supra,* at 327.

[25] We recognize that a search of documentary evidence may, under certain circumstances, constitute a greater invasion of privacy than the ordinary search for other kinds of real or physical evidence, since it may entail an examination of various unrelated documents with which the document or documents described in the warrant may be intermingled (see *United States* v. *Bennett*, *supra*, 409 F. 2d at 896, 897; American Law Institute, *A Model Code of Pre-Arraignment Procedure*, *supra*, at Section SS 210.3). How-

CONCLUSION

For the reasons stated, the judgment of the Court of Special Appeals of Maryland should be affirmed if it is concluded that the search and seizure was conducted in conformity with the procedural requirements of the Fourth Amendment.

Respectfully submitted.

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ever, this problem is always present where conversations are seized by wiretapping or eavesdropping. Yet it is settled that conversations so seized are not subject to any *per se* exclusionary rule predicated on either Fourth or Fifth Amendment grounds. Instead, the privacy interests at stake are protected by the procedural requirements of the Fourth Amendment. See *Katz* v. *United States*, 389 U.S. 347; *Berger* v. *New York*, 388 U.S. 41.

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